
(2001) 05 OHC CK 0001
In the Orissa High Court
Case No : O.J.C. No. 10140 of 2000

Manorama Badu Mohapatra and Others	APPELLANT
Vs	
Girish Chandra Naik and Others	RESPONDENT

Date of Decision : 18-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(3)
Constitution of India, 1950 — Article 136, 226, 227, 32

Citation : (2001) 92 CLT 716

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : J. Patnaik, N.C. Pati, A. Das, A.K. Mohapatra and S. Mishra, for the Appellant; Dinabandhu Mishra, A.K. Padhi, J. Pati and A.K. Rath, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanty, J.—The petitioners in the present writ application have approached this Court with the following prayer :

"It is, therefore, humbly prayed that this Hon"ble Court be graciously pleased to admit this writ application and direct the opp. parties to show cause as to why action shall not be taken against them for illegally and forcibly demolishing the residential house of the petitioners and to give further show cause as to why the petitioners shall not be protected and compensation be given to them by the opp. party Nos. 1 and 2 and if the opp. parties fail to show cause and show any insufficient cause, then the aforesaid rule be made absolute ;

And pass any other order/orders as may be deemed fit and proper by this Hon"ble Court."

2. The petitioners allege that the opp. parties have demolished the residential houses, which are the subject matter of Title Appeal No. 51 of 2000 pending before the learned District Judge, Puri and trying to dispossess them forcibly

without following due process of law and without giving the petitioners any notice, even though no execution case was tiled by opp. parties 1 and 2. It is further alleged that opp. parties 1 and 2, with the help of other opp. parties demolished the houses of the petitioners in presence of the district officials and local police. The dispute relates to Mouza-Dandimala Sahi, Khata No. 112, Plot No. 99, measuring Ac. 0.160, Plot No. 100 measuring Ac. 0 070, Plot No. 101 measuring Ac. 0.040 and Plot No. 102 measuring Ac. 0.050 situated in Puri town adjacent to Badadanda, which was the subject matter of dispute in two suits bearing O.S. No. 212 of 1977 and O. S. No. 211 of 1977 before the learned Munsif (Civil Judge, Jr. Division), Puri, O. S. No. 2LI of 1977, which was re-numbered as O. S. No. 90/211 of 84/77, was decreed on 12-5-2000 with the direction that the defendants are to deliver vacant possession of the suit property within two months from that date, failing which the plaintiff may take action for eviction of the defendant from the suit property and for recover possession of the same. The petitioners, who are the defendants have preferred Title Appeal No. 51 of 2000 before the learned District Judge, Puri, which has been admitted and the present opp. parties 1 and 2 have entered appearance. According to the petitioners, no execution case was filed for execution of the decree, inasmuch as Radhashyam Badu Mohapatra (opp, party No. 9) has also preferred a separate appeal against the judgment and decree. At para-17 of the writ petition, it is averred that one Sanjaya Narayan Sanyal also filed a Title Suit against one Bauribandhu Das against the self-same plot numbers for eviction, but the petitioners were not impleaded as parties, even though they were possessing the entire disputed land. The Addl. Munsif, Puri, (now Addl. Civil Judge, Jr. Division,), decreed the suit on 3-9-1983 and the defendant, Bauribandhu Das was directed to give vacant possession of the land to the plaintiff. Thereafter, the defendant preferred a Title Appeal before the learned District Judge, which was dismissed on 10-4-1984. The defendants preferred Second Appeal No. 232 of 1984 before this Court, which ended in compromise on 8-12-1984, wherein the defendants agreed to deliver vacant possession of the suit premises within two weeks thereafter.

3. The petitioners allege that during the pendency of First Appeal No. 51 of 2000 before the learned District Judge, Puri, the present opp. parties 1 and 2 forcibly entered into the said premises with the help of the opposite parties, demolished the suit rooms, which were in possession of the petitioners as their residential houses on 10-10-2000, as a result of which the family of the present petitioners were rendered homeless and were thrown to the street sustaining loss to the tune of Rs. 25.00 lakhs. There has been allegations of ill-treatment by the local police and threatening meted out to the petitioners and that the disputed premises was never demarcated and the local Amin was not present at the spot, but opp. party No. 3 identified the wrong properties, which were demolished subsequently and the demolition has been taken place solely on the basis of the demarcation made by opp. party No. 3 without any demarcation by the Amin.

4. In paragraph 22 of the writ petition, it is averred that although there is a

decree against the present petitioners, the same is not executable without filing an execution case. Even otherwise also, the description of the suit property is not specific and not identifiable from the decree. The defendants were directed to give vacant possession of the suit schedule land within three months from the date of decree to the plaintiff and it was directed that otherwise it was open to the plaintiff to take possession by following due procedure of law. It is asserted that even though accepting the fact that the demolition is legal for the sake of argument, the plaintiff could not have demolished an inch of the premises other than the portion disputed and shown in red in the sketch map attached to the decree, but however, the plaintiffs got some rooms demolished, which were never the subject matter of the dispute excepting two rooms, all other rooms have been demolished. All these illegalities were committed in presence of the police officers, one Magistrate from the Collectorate and a court pcon-cum-process server. Hence, the writ petition on the aforesaid prayer.

5. Opp. parties 1 and 2 in their counter affidavit have denied the allegations made in the writ petition inasmuch as it is stated that since the alleged demolition, if any, was in course of execution of the decree of the competent Civil Court and the petitioners have preferred an appeal as against the said order, the present writ petition is not maintainable in law and is liable to be dismissed on that ground alone. These opposite parties challenge the maintainability of the writ petition on the ground of res judicata, the writ petition O. J. C. No. 10467 of 2000 at the instance of the petitioner No. 1 on the self-same allegations having been dismissed by this Court by order dated 23-10-2000.

6. Sri R. Mohapatra on behalf of Sri A. K. Ratha, learned counsel for opp. parties 1 and 2 has raised a preliminary objection with regard to maintainability of the writ application on the ground of res judicata and alternate efficacious remedy. It is submitted that on the basis of a complaint letter filed by petitioner No. 1 on behalf of her family members, the other petitioners and opp. party No. 9 on the self-same allegations, O. J. C. No. 10467 of 2000 was registered and on consideration of the allegations made, another Division Bench of this Court having disposed of the writ petition by order dated 23-10-2000 with the observation that since the Title Appeal No. 51 of 2000 is pending in the court of the District Judge, Puri, it is open to the petitioners to move the learned District Judge for necessary relief with regard to the order passed in Execution Case No.99/7 of 1983 pending in the court of Munsif, Puri, the present writ application on the self-same allegation and the cause of action at the instance of the petitioners is not maintainable being hit by the principles of res judicata. However, Sri J. Patnaik, learned counsel for the petitioners, has urged that in the facts and circumstances of the case, the principle of res judicata is not applicable and as such, the writ petition is maintainable in law. However, since the question of maintainability of the writ application on the ground of res judicata has been raised, the same is taken up for consideration.

7. Opp. parties 1 and 2 have filed a copy of the petition, which was registered as

O.J.C. No. 10467 of 2000. The petition discloses that petitioner No. 1 complained that without filing any Execution Case and without any order of the Civil Court, opp. parties 1 and 2, with the help of other opp. parties, forcibly and illegally dispossessed them from the suit house even during the pendency of the Title Appeal No. 51 of 2000 as against the judgment and decree of the Civil Court. It is further alleged that opposite parties 1 and 2 on gaining over the police, process server and Executive Magistrate, even in spite of protest made before the process server, they have dispossessed. The petition describes opposite parties 1 and 2 as accused persons under the heading "name of the accused persons along with five others including the opp. parties 3, 4 and 5 and the scheduled of properties given in the said petition are also exactly the same as indicated in Paragraphs of the present writ application. The petitioners in the present writ application have also alleged that without due process of law in absence of any execution proceeding, the property has been proceeded against inasmuch as in spite of the pendency of the Appeal in Title Appeal No. 51 of 2000 at the instance of the petitioners, the eviction has been: levied. The dispute raised in the previous writ application being identically similar with the self-same allegation and prayer in the present writ application, it is submitted that it is not maintainable.

8. The learned counsel for opposite parties 1 and 2 has referred to the decisions in M/s. Upadhyay and Co. Vs. State of U.P. and Others, ; Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, ; Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, in support of his contention that a second writ application on the self-same allegation and prayer is not maintainable in law. However, Sri Jagannath Patnaik, learned Senior Advocate appearing on behalf of the petitioners contends that the earlier writ petition O.J.C. No. 10476 of 2000 was registered on the basis of a letter of petitioner No. 1 and in that case, the parties were not heard inasmuch as the Court disposed it of with the direction that the petitioners may approach the appellate court, in the pending appeal for redressal of her grievance and as such no decision has been rendered so that the present writ petition would be barred by res judicata. The learned Senior counsel for the petitioners has referred to the decision of the Apex Court in Daryao and Others Vs. The State of U.P. and Others, in P. D. Sharma v. State Bank of India A. I. R 1968 SC 958 and in Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, in support of his contention,

In the case of M/s. Upadhyay (supra), the Apex Court held that the bar under Order 23, Rule 1(3) of the C. P. C. to file a fresh suit in case of withdrawal of suit without seeking permission to file a fresh suit is based on public policy. This rule of public policy is applicable to writ petitions filed under Article 226 and Special Leave Petitions under Article 136 of the Constitution of India. Thus, this case does not help the contention of the opposite parties except for the purpose that the principle of bar or res judicata applies to a writ petition even in cases of

withdrawals of the petitions also. In *Forward Construction Co. v. Municipal Corporation* (supra), the Apex Court held that section 11 in view of Explanation-VI applies to Public Interest Litigation also. It has been further held that in view of Explanation IV of section 11, C. P. C., an adjudication is conclusive and final not only to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and have it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of matters of claim or defence. In that case, the writ petitioner challenged by way of a Public Interest Litigation, the commercial use of the plot reserved for bus stop, which was dismissed. The subsequent writ petition for similar purpose challenged commercial user on a ground which is absent in earlier petition, but it was held that the earlier petition would operate as *res judicata* in the subsequent petition even on that ground. In *Sarguja Transport Sarguja* (supra) the Apex Court on the question whether the principle of *res judicata* would operate in a case of withdrawal of a writ petition without obtaining permission for filing a fresh petition, held that in absence of a permission for filing a fresh writ petition under Article 226 of the Constitution, the subsequent writ petition would be hit by the rule.

In *Daryao's case* (supra), the Apex Court was considering the applicability of the rule of *res judicata* to a petition under Article 32 of the Constitution before the Apex Court in case where the petition filed under Article 226 of the Constitution is dismissed. The learned counsel has emphasized on the observation of the Apex Court that if the petition filed in the High Court under Article 226 is dismissed not on merits, but because of the laches of the party applying for the writ because it is held that the party had an alternative remedy available to it, then dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if facts thus found by the High Court may themselves be relevant even under Article 32. The Court held that if the petition is dismissed in limine without passing a speaking order, then such dismissal cannot be treated as a bar of *res judicata*. The facts of the aforesaid case however is not applicable to the present writ petition since the petitioners had earlier moved this Court in a petition under Article 226 of the Constitution which was dismissed with observation and the present writ petition is on a similar ground and for a similar relief. In *P. D. Sharma's case* (supra) referred to by the learned counsel, the Apex Court held that where the writ petition was summarily dismissed not by a speaking order no question of *res judicata* would arise. The scope of appeal under Article 136 is much wider than Article 226 since the Supreme Court under Article 136 can go into the questions of facts as well as law whereas the High Court in the writ petition would have considered the question which would have been strictly relevant in an application for a writ of certiorari. Similarly, in *Century Spinning & Manufacturing Co, Ltd. and Anr. case* (supra), the Apex Court held that the High Court may by exercise of judicial discretion decline to exercise its extra-ordinary jurisdiction under Article 226. If the

petitioners make a claim which is frivolous, vexatious or prima facie unjust or may not be appropriately tried in a petition invoking extra-ordinary jurisdiction, the Court may decline to entertain the petition. This decision does not support the contention of the petitioner since in the earlier writ application, the Court on consideration, did not like to interfere in its writ jurisdiction on the basis of the facts alleged therein in view of the pending appeal filed by the petitioners themselves, where such matter would be agitated properly.

9. The writ petitioner No. 1 admittedly for self and the other petitioners had approached this Court, on the self-same allegation that the opp. parties 1 and 2 without filing execution case, for execution of the decree of the learned Civil Judge (Junior Division) as against which they have filed Title Appeal No. 51 of 2000, pending before the learned District Judge, Puri, have forcibly and illegally dispossessed them from the suit house on gaining over the police, the process server and Executive Magistrate even in spite of their protest. That petition was registered as O. J. C. No. 10467 of 2000 and by order dated 23-10-2000 that writ petition was disposed of with the following observation/direction:

"We have perused the petition. Since the Title Appeal No. 51 of 2000 is pending in the court of the District Judge, Puri, it is open to the petitioner to move the learned District Judge for necessary relief with regard to the order passed in Execution Case No. 77/7 of 1983 pending in the court of the Munsif, Puri.

With the aforesaid observation, the writ petition is disposed of."

10. In the present petition also the allegations are similar. But however, the writ petitioners have not even whispered anything about the earlier petition and rather in the certificate required under the High Court Rules as to whether the matter out of which the petition arises was before the Court earlier, even though the numbers of other three writ petitions and a Civil Revision has been given, there is no reference to O.J.C. No. 10467 of 2000 or even to the petition filed by petitioner No. 1. In that view of the matter, it has to be held that the present writ petition is hit by the principle of res judicata and as such not maintainable.

In *Ghan Shyam Das Gupta and another Vs. Anant Kumar Sinha and others*, the Hon"ble Supreme Court had held that the remedy provided under Article 226 is not intended to supersede the modes of obtaining relief before a Civil Court or to deny defendants legitimately open in such actions. So far the question of executability of a decree is concerned, the CPC contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of Order 21 of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree-holders, but also to claimant objectors as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the Civil Court. The remedy under the CPC is of superior judicial quality than what is generally available under other statutes. It is difficult to find a case where interference in writ

jurisdiction for granting relief to a judgment debtor or a claimant objector can be justified.

In Smt. Parvatibai Subhanrao Nalawade Vs. Anwarali Hasanali Makani and others etc., the Apex Court has emphasized that the case relating to immovable property are governed by ordinary civil law and special (writ) jurisdiction should not be exercised by the High Court unless circumstances are exceptional. The aforesaid decisions of the Apex Court squarely covers the present case in hand. The petitioners in this petition challenges the executability of the decree, the manner in which it has been executed and the alleged action of the opp. parties. In that view of the matter, it was open to the petitioners to make fresh grievance in the appellate court or if so advised, by filing a suit but, the writ court cannot be the forum for making such grievance. The writ petition therefore is not entertainable in that ground also. This Court has already disposed of the earlier writ application observing that the writ petitioners can move the appellate court, where the appeal is pending consideration as against the judgment and decree, passed by the learned Civil Judge (Jr. Division). The petitioners cannot be allowed to agitate their grievance, by repeatedly filing writ petitions under Article 226 of the Constitution of India on the self-same cause of action.

In any view of the matter, I find no reason to entertain this writ petition, which is accordingly dismissed. But in the circumstances, there shall be no order as to cost.

11. Writ petition dismissed.